CLERK'S COPY

91-400

United States

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 4

J. OLIVER HILL, ADMINISTRATOR OF THE ESTATE OF BERTHA BYRD, DECEASED, PETITIONER,

vs.

FRANCIS L. HAWES, INDIVIDUALLY AND AS TRUSTEE AND RAYMOND D. EVANS, TRUSTEE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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IN UNITED STATES DISTRICT COURT FOR DISTRICT OF COLUMBIA

Docket Entries

(Civil Action No. 5003)

Date 1940		Proceedings
May	7.	Deft's findings of fact & conclusions of law signed. Goldsborough, J.
"	7.	Pltf. findings of fact & conclusions of law filed.
"	7.	Decree dismissing suit. Goldsborough, J.
June	3.	Notice of Appeal by Plff. (notice of Appeal. Copy mailed to Hawes et al. & Miller et al. by Clerk) filed.
"	"	Deposit by Johnson Jr. Clerks Cost on Appeal. Deposits, $5; Fees, $5; Total, $5.
"	6.	Motion to enter judgment & direct clerk to notify parties. Notice P & A filed.
"	6.	Points & Authorities of Def't #1 filed.
"	7.	Amended Points & authorities in opposition to motion to enter judgment and direct clerk to notify parties; exhibit A.
"	13.	Order vacating jdgt. of 5/7/40 (2 notified). Goldsborough, J.
"	"	Judgment dismissing cause (2 notified). Goldsborough, J.
"	14.	Notice of Appeal by Plff. (Notice Mailed to Hawes & Miller, by Clerk.)
"	24.	Motion of Deft. #1 to reconsider order to vacate Judgment. Notice, Service, Affidavit, Exh. (1) & P. & A. filed.
"	"	Order dismissing motion to enter judgt. O'Donoghue, J. (n).
July	23.	Motion of plaintiff to extend time for filing transcript.
"	"	Order extending time 90 days from June 14/40 for filing transcript of record in Court of Appeals. Laws, J. (n).
Aug.	22.	Bond for $250.00 with U. S. Fidelity and Guaranty Co., Surety Approved. Pine, J.

Sept. 9. Designation of record & Assignment of error filed.
" 16. Appearance Gunion for Deft. Hawes filed.
" 17. Narrative Statement of testimony & Copy filed.
" 19. Appellee's designation of additional portions of the record, proceedings and evidence filed.
" 23. Motion to strike Plaintiffs Narrative Statement for record on Appeal & Points & Authorities filed.
" 26. Order U. S. Court of Appeals extending time to 10/9/40 to file record filed.
" 26. Additional P. & A. in support of mo. to reconsider etc. filed.
" 27. Praecipe withdrawing deft's mo. to strike pltf. narrative statement filed.
" " Mo. to strike certain portions of pltf. designation of record with P. & A. filed.

[fol. 10b]

Oct. 11. Time to file record in Ct. of Appeals ext. to Nov. 7. Copy Order filed.
" 31. Mo. to strike etc. overruled in part and granted as to requiring pltf. to substitute testimony in Q. and A. form. Goldsborough, J.
Nov. 18. Time to file record in C. A. ext. to Dec. 4 filed.
Dec. 13. Time to file record in C. A. ext. to Dec. 30, 1940 filed.
" 31. Motion to send original exhibits to appellate court in lieu of copies. P. & A. notice filed.

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Jan. 7. Opposition to motion to send original exhibits to appellate court in lieu of copies thereof—motion to require pltf. to file question & answer form of testimony as required by order of court filed.
" " Motion to require H. L. Johnson to show authority to further act as attorney in these proceedings filed.
" " Motion to require Pltf. to submit order showing that court has acted on motion to reconsider order to vacate judgment, filed.
" 16. Order U. S. Court of Appeals for D. C. extending time to 2/1/41, to file record, filed.
" 23. Transcript of shorthand report of testimony (in Dup.) filed.

Jan. 23. Order for original exhibits to be transmitted to U. S. Ct. of Appeals etc. Goldsborough, J. (n).
" 30. Cert. of counsel as to accuracy and identity of copies of transcript of record filed.
Feb. 12. Order U. S. Court of Appeals for D. C. extending time to 3/3/41, to file record, filed.
" 19. Plaintiffs exhibits (7) filed.
" 24. Exhibit of plaintiff (Deed of Trust) filed.
" 25. Stipulation of Counsel as to motion of 6/6/40, filed.
" 28. Motion to require plaintiff to pay defendant for the use of defendants transcript, Notice, P. & A. & Exhibits (3) filed.
March 3. Exhibit filed.
" " Transcript of Record to Johnson, Jr. & Dept. Deposits, $19.45; Fees, $19.45; Total, $19.45.
" 24. Order taxing costs of Court Stenographer. Goldsborough J. (n).
May 12. Cert. of Clerk concerning absence of motions & Dep. by Gunion. Deposits, .50; Fees, .50; Total, .50.

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Aug. 4. Order of Ct. of Appeals for transmittal of supplemental record showing docket entries made on and after May 7, 1940, filed.

[fols. 10c-11] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 12] IN UNITED STATES DISTRICT COURT

PRETRIAL PROCEEDINGS—Filed March 19, 1940

Statement of Nature of Case:

Bill to release and cancel a second deed of trust held by defendant Francis L. Hawes, and for an accounting. Plain-
[fols. 13-22] tiff claims that by reason of usurious transactions with defendant Hawes, she has paid to the said Hawes an amount in ex-ess of any lawful obligation which she assumed by reason of payments to her, and accordingly that defendant is liable to account to her for such excess payments. Defendant maintains that first, he purchased

the second trust not of plaintiff but from a party represented by an agent, and that the said defendant did not make a loan to the plaintiff so that there was no usury involved; second, that the plaintiff is not entitled to maintain this suit because she has been and now is in default of obligations due under the note, whether such obligations are in the face amount of the note, or consist of the amount actually advanced her; third, that by reason of plaintiff having become the real purchaser, acting under or through a straw party, in a foreclosure under the second trust, she waived any claim of wrongful act in connection with said trust; and further is estopped; fourth, that in 1929, plaintiff brought about an illegal foreclosure for the express purpose of depriving her husband of any claim in the property and that, therefore, having engaged in an illegal act, should not be granted any relief in a Court of Equity.

Defendant is given five days in which to amend in order to claim laches, as an additional defense.

Stipulations:

Parties stipulate that certain documents bearing initials of the Court, may be received in evidence without formal proof.

Attorneys authorized to act:

H. J. Johnson, Jr., *Plaintiff*.
Herman Miller and Katherine Hawes, *Defendant*.

Dated—March 19, 1940.

Bolitha J. Laws, *Presiding Judge*.

* * * * * * *

[fol. 22a] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES and RAYMOND D. EVANS, Defendants

DECREE DISMISSING SUIT—Filed May 7, 1940

This action came on to be heard at this term: and thereupon, upon consideration thereof, it is, this 7th day of May, 1940, adjudged as follows:

1. That the bill of complaint filed herein be and the same is hereby dismissed.

2. That the tender of resignation as trustee by the defendant, Francis L. Hawes, be accepted, and Raymond D. Evans be and is hereby appointed substitute and sole trustee.

3. That costs of suit be taxed against the plaintiff.

T. Allan Goldsborough, Justice.

DOCKET ENTRY

1940, May 7. Decree dismissing suit, Goldsborough, J., filed.

[fol. 22b] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES, et al., Defendants

NOTICE OF APPEAL—Filed June 3, 1940

Notice is hereby given this 3rd day of June, 1940, that Bertha Byrd, plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the

judgment of this Court entered on the 7th day of May, 1940 in favor of Francis L. Hawes and Raymond D. Evans, defendants against said Bertha Byrd, plaintiff.

Henry Lincoln Johnson, Jr., Attorney for Plaintiff, 615 F St., N. W.

Notice to: Katherine Hawes, attorney for defendant Francis L. Hawes, Southern Bldg. Herman Miller, attorney for defendant Raymond D. Evans, No. 1. Thomas Circle, N. W.

[fol. 22c] DISTRICT COURT OF UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES, et al., Defendants

MOTION TO ENTER JUDGMENT AND DIRECT CLERK TO NOTIFY PARTIES—Filed June 6, 1940

Now comes the plaintiff in the above entitled cause, by her attorney, and moves the court to direct the clerk to enter the judgment in the above entitled cause and to notify the parties to this cause of the date and fact of such entry, and for reason therefore assigns as follows:

1. That the clerk of the court has failed to enter the day or month of the judgment of this court as is required by the rules of this court.

2. That the clerk of this court has failed to notify the parties to this cause of the action of the court in this cause.

3. For other reasons apparent upon the fact of the record.

(Signed) Henry Lincoln Johnson, Jr., Attorney for Plaintiff.

Henry Lincoln Johnson, Jr., 615 F Street, N. W., District 8000, Attorney at Law.

[fol. 22d] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action, No. 5003

BERTHA BYRD, 616 K St. N. W., Plaintiff,

vs.

FRANCES L. HAWES, Individually and as Trustee, Southern Building and Raymond D. Evans, 925 New York Ave. N. W., Defendants

ORDER TO VACATE JUDGMENT—Filed June 13, 1940

It is this 13th day of June, 1940, ordered and adjudged that the judgment entered, in the above entitled cause, filed May 7, 1940, be vacated for the reason that the clerk failed under Rule 77 d. of the Rules of Civil Procedure to serve a notice of the entry of judgment by mail on the plaintiff in the above entitled cause, and to make a note in the docket of the mailing.

T. Allan Goldsborough, Justice.

[fol. 23] IN UNITED STATES DISTRICT COURT

* * * * * * *

JUDGMENT—June 13, 1940

Upon consideration of the pleadings, exhibits and testimony adduced in open Court, it is this 13th day of June, 1940 Ordered and Adjudged:

(1) That the bill of complaint filed herein be and the same is hereby dismissed.

(2) That the tender of resignation as trustee by the defendant, Francis L. Hawes, be accepted, and Raymond D. Evans be and is hereby appointed substitute and sole trustee.

(3) That costs of suit be taxed against the plaintiff.

T. Allan Goldsborough, Justice.

* * * * * * *

[fol. 24a] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil No. 5003

BERTHA BYRD Plaintiff.

vs.

FRANCIS L. HAWES, et al., Defendants

NOTICE OF APPEAL—Filed June 14, 1940

Notice is hereby given this 14th day of June, 1940, that Bertha Byrd, plaintiff herein hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of June, 1940 in favor of defendants, Francis L. Hawes and Raymond D. Evans against said plaintiff, Bertha Byrd.

Henry Lincoln Johnson, Jr. Attorney for Plaintiff
615 F. St., N. W.

Notice to: Katherine Hawes, Attorney for defendant Francis L. Hawes, Southern Building, Herman Miller, Attorney for defendant Raymond D. Evans, No. 1 Thomas Circle, N. W.

[fol. 24b] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES and RAYMOND D. EVANS, Defendants

MOTION TO RECONSIDER ORDER TO VACATE JUDGMENT—Filed June 24, 1940

The defendant, Francis L. Hawes, moves the court to reconsider its Order to Vacate Judgment upon the following grounds:

1. That the plaintiff, Bertha Byrd, has been properly notified of the entry of the final decree on May 7, 1940 by reason of the following:

a. That notice of the entry of the final decree on May 7, 1940 was written up for mailing, as is more par-

ticularly set forth in the Affidavit of Paul A. Dawson, Assistant Clerk, attached hereto and made a part hereof, and that such notices are customarily mailed forthwith as required by Rule 73 (d) of the Federal Rules of Civil Procedure.

* * * * * * * *

[fol. 24c] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES AND RAYMOND D. EVANS, Defendants.

AFFIDAVIT—Filed June 24, 1940

DISTRICT OF COLUMBIA, ss:

I, Paul A. Dawson, being first duly sworn according to law, depose and say that I am an Assistant Clerk of the District Court of the United States for the District of Columbia, acting as Clerk for Civil Division No. 3; and that I personally made a notation on the Day Book of Civil Division No. 3 of a large letter "N" beside the entry of the final decree in the above-entitled cause, and that said "N" shows that notice of the entry of the final decree was written up for mailing to the parties herein.

Paul A. Dawson.

Subscribed and sworn to before me this 20th day of June, 1940.

Geo. P. Newton.

[fols. 24-d-47] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

Civil Action No. 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES AND RAYMOND D. EVANS, Defendants.

ORDER DISMISSING MOTION

This cause came on to be further heard: and thereupon, upon consideration thereof, it is, this 24th day of June, 1940, adjudged as follows:

That the Motion to Enter Judgment and Direct Clerk to Notify Parties be, and the same is, hereby dismissed.

Daniel W. O'Donoghue, Justice.

[fol. 48] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Appellant,

vs.

FRANCIS L. HAWES and RAYMOND D. EVANS, Appellees

MOTION TO DISMISS

Appellee, Francis L. Hawes, moves the Court to dismiss the appeal for the following reasons:

A. *For Failure to Note Appeal Within Time*

1. The appellant failed to file a notice of appeal within twenty days from the entry of judgment; a notice of appeal was not filed until June 3, 1940, (page 37 of the record) more than the twenty days allowed by Rule Number 10 of the Rules of the United States Court of Appeals for the District of Columbia with amendments to December 16, 1936, in effect at that time. The record in this case, docketed March 3, 1941, discloses that the lower Court entered a final judgment dismissing the suit on May 7, 1940, (page 36 of the record) and the docket entry of the filing of the judgment was made by the Clerk of the District Court on May 7, 1940, (page 36 of the record).

2. Appellant in an attempt to gain more time within which to note an appeal filed a motion in the District Court to enter judgment and direct the Clerk to notify parties, (page 38 of the record) on June 6, 1940, more than [fol. 49] twenty days after the entry of the final judgment on May 7, 1940, which was opposed by the appellee in amended points and authorities filed in answer to this motion on June 7, 1940, (page 39 of the record). This motion was subsequently dismissed by an order of the Court, June 24, 1940, (page 49 of the record).

3. The District Court, however, in order to give appellant an opportunity to note an appeal, entered an order vacating the judgment of May 7, 1940, on the grounds that

the Clerk failed to serve a notice of the entry of the judgment by mail on the plaintiff, and to make a note in the docket of the mailing (page 42 of the record). This order was filed on June 13, 1940, more than twenty days after the final judgment entered on May 7, 1940, being 37 days later. The Court then filed on June 13, the same day, a judgment different in form but identical in substance to that filed on May 7, 1940, (page 41 of the record) more than twenty days after the entry on the docket of the judgment of May 7, 1940. This was a violation of Rule 6 (b) of the Federal Rules of Civil Procedure, which provides that various periods of time for the doing of an act at or within a specified time may be enlarged before the expiration of the time and even after expiration of the time where there is excusable neglect. But this rule specifically provides that the Court may not enlarge the period for taking an appeal as provided by law. This would apply whether the neglect was excusable or inexcusable. This was also in disregard of the guide to the bar and to the Courts in the case of *Burke* v. *Canfield*, 72 App. D. C. 127, 111 Fed. 2d 526, which held that infinite mischief has been produced in overlooking errors of form and prosecuting appeals in violation of the rules. (See *Wilson Co.* v. *Ward*, Vol. 69 W. L. R. 489, an opinion concerning Rule 6 (b) by Justice Luhring.) No [fol. 50] application by motion or notice for this order of vacation was made either before or after the expiration of the twenty-day period from May 7, 1940, for noting an appeal. (See certificate of the Clerk attached hereto as Exhibit A.)

4. The notation of the judgment in the Civil Docket on May 7, 1940, (page 36 of the record) as provided in Rule 79 (a) and Rule 58 of the Federal Rules of Civil Procedure constituted the entry of the judgment and the time from which it became effective for all purposes. A judgment is effective on its entry not the time of service of notice of the entry. The time for taking an appeal cannot be extended for failure to serve notice of the entry of the judgment on the parties.

Siegel vs. *Margiotta*, 102 Fed. 2d 525. The Court stated the law to be as follows:

"* * * It has always been the uniform custom in federal courts so far as we know to make the time to appeal begin with the entry of the judgment, not with its service

upon the putative appellant; that the New Rules of Civil Procedure (28 U. S. C. A. following section 723 c) have not changed. *Thus the Appellant must at this risk keep watch upon the entry of an order.*" (Underlining supplied.)

5. Appellant subsequently filed another notice of appeal on June 14, 1940, (page 43 of the record) more than twenty days after the final judgment entered by the lower Court on May 7, 1940, being 38 days later.

6. Appellee filed a motion in District Court on June 24, 1940, to reconsider the order to vacate the judgment (page 44 of the record) with an attached affidavit and exhibit (page 47 and page 48 of the record) which motion, affidavit and exhibit disclose that the appellant had notice or should have had notice of the entry of the decree of May 7, 1940, and that the Clerk of the District Court entered in his Civil [fol. 51] Order Book a note of the mailing of the notice of entry of the judgment. Inasmuch as no order overruling this motion has been entered (See attached certificate of the Clerk of the District Court, Exhibit A) appellee offers the explanation to the Court of Appeals that the Court below did overrule said motion stating that it did not wish to cut off any person from an appeal, and that Appellee's attorney (See certificate, Exhibit B) did draw up an order overruling said motion when it became evident that the record was remaining incomplete and did present this order to Appellant's attorney, for signing and filing.

7. In reliance upon the absolute wording of Rule 6 (b) and in good faith believing the cause herein to have terminated, Francis L. Hawes, the appellee, instructed the trustee of the second trust to proceed with foreclosure proceedings against the property in suit, and proceedings were held more than twenty days after the final decree of May 7, 1940, on June 4, 1940. As is fully set out in the attached affidavit of Francis L. Hawes, Exhibit C, the real property involved in suit had brought no income to either first or second trust holders since April 20, 1939, and had depreciated in value because of lack of repairs. Because of threatened first trust foreclosure, defendant was in haste to foreclose under his subsequent lien. The foreclosure sale of June 4, 1940, resulted in a purchase by J. Oliver Hill, as agent for Bertha Byrd, who failed to go through with the sale. This default resulted in a foreclosure, August 9, 1940, under the first trust and a wiping out of the

second trust. This attempted foreclosure sale under the second trust placed defendant in an anomalous position, to say the least, for it was held before the entry of the judgment of June 13, 1940.

[fol. 52] 8. Not only has the mandate of the law contained in Rule 6 (b) of the Federal Rules of Civil Procedure been violated but constant delays and violations of other Rules of the Courts present a total result in direct opposition to the spirit and purpose of the Rules of any Court. (See attached affidavit of Katherine N. Hawes, Exhibit D.) "Infinite mischief" has resulted.

9. Other delays are with restraint here noted. It is a matter of record that numerous extensions of time have been granted appellant in the District Court and the Court of Appeals and that he was late in filing his brief and asking for an extension of time therefor, the net result being that approximately ten months elapsed since May 7, 1940, before the docketing of this appeal on March 3, 1941, and approximately one year before the filing or service of any brief by appellant.

10. It is a well recognized policy of the law to prohibit and prevent continuously delayed litigation of an issue after litigants have had their day in Court and have been afforded due process of law. This policy is strictly enforced in order that society may not be continuously stirred up and harassed by long-continued, uncertain litigation, the continuance of which is more detrimental to litigants and society than any alleged original grievance of one member of society against another. The constant and continuous failure of attorneys and Courts to comply with the rules of Court results in an onerous burden to the litigants, involved and to society as a whole, and the appellee in this case has felt the full weight of this burden.

B. *Because Relief Asked By Appellant Is Moot*

1. The second trust of Bertha Byrd to Francis L. Hawes dated July 1, 1929, has been wiped out by the foreclosure of [fol. 53] the trust from Bertha Byrd to Arms and Drury, dated June 14, 1926, which sale held August 9, 1940, and the purchase thereat by Georgie H. Kelly as agent for Francis L. Hawes was upheld by the District Court of the United States for the District of Columbia in the case of *Bertha*

Byrd vs. *National Valley Bank of Staunton and Francis L. Hawes*, Civil Action Number 8290, relevant parts of which are attached hereto as Exhibit E.

2. Georgie H. Kelly acting as agent for Francis L. Hawes, appellee, has been given judgment for possession of the premises in the case of *Georgie H. Kelly* vs. *Byrd, et al.*, in the Municipal Court of the District of Columbia, Landlord and Tenant Branch, Number 899878. A record of this protracted litigation is attached hereto as Exhibit F.

3. Reference is also made to the grounds stated in Part C of this motion.

C. *For Lack of Statutory Right of Personal Representative to Recover Usury*

1. The claims of appellant rise or fall on the question of the right to recover usury. (See appellant's brief.)

2. This Court has recognized the death of Bertha Byrd, the appellant, on December 4, 1940, by its order of April 26, 1941, substituting her administrator herein.

3. The usury statute of the District of Columbia does not give the right to recover usury to a personal representative of the party paying the usury.

4. In the case at bar Bertha Byrd alone was entitled to receive the benefit of our usury statute for any usury she may have paid during her lifetime. Her rights in this regard have abated with her death.

[fol. 54] *Citation of Authorities for Ground C*

The Code of the District of Columbia, 1924, Section 1181, and the Code of the District of Columbia, 1929, Title 17, Chapter 1, Section 4, limits the recovery of usury paid to the person paying the same. Although usury statutes in many of the states provide that the person paying usury or his personal or legal representative may recover and this was formerly the case in the Disrtict of Columbia (See *Kendall v. Vanderlip*, 2 Mackey (D. C.) 105, and *Phillips v. Ogle*, 21 D. C. 199, p. 207, involving Chapter 32, Sec. 4, District of Columbia, U. S. Compiled Statutes in Force 1889—Torberts Lovejoy) our present usury statute does not contain the provision that the personal representative may recover.

This present statute has its origin in the first District of Columbia Code approved March 3, 1901. Research in the Congressional Library fails to reveal any committee hearings or Congressional debate on the interest and usury code sections. The assumption must be that Congress intentionally deleted the provision for recovery of usury by the personal representative and confined the right to the penalty to the person actually paying the usury. A specific statute in derogation of the common law cannot be extended by implication to include persons who do not come within its terms. *Wood v. White*, 97 Fed. (2d) 646, 68 App. D. C. 341; *De Ruiz v. De Ruiz*, 66 App. D. C. 370, 88 Fed. (2d) 752.

In *Garris v. Thomas*, 66 So. C. 57, 44 S. E. 374, the Court said, concerning its usury statute of 1877-1878, that nowhere by its terms did it empower an executor, administrator or the heirs at law or assigns of a deceased person to recover usury, that the law which denounced usury made the punishment thereof a penalty or forfeiture, was personal to the debtor and died with him, that it did not survive [fol. 55] to his assignee or personal representative. The Court found that a later South Carolina usury statute allowing a personal representative to recover did not apply to this earlier transaction. The situation in the District of Columbia is reversed. We once had a law permitting the personal representative to recover usury, but now our law merely empowers the person paying the usury to recover the penalty of all interest paid.

In *Allen v. Petty*, 58 So. C. 240, 36 S. E. 586, citing *McBroom v. Scottish Investment Co.*, 153 U. S. 318, for the point that the Court cannot allow a penalty which is not to be found in the statute, the Court held, in discussing an early South Carolina usury statute, that a counterclaim based upon a statutory remedy for the recovery of usury was in the nature of a penalty and did not survive the death of the party making such counterclaim.

"Usury is, of course, merely a statutory offense . . ." *Missouri, Kansas and Texas Trust Company v. Krumseig*, 172 U. S. 351, p. 355, 19 S. C. 179, 43 L. Ed. 474. Usury statutes are penal in nature, usury being *mala prohibita*, and the right to recover the same is a remedy existing by virtue of statute alone, which does not give a vested right of recovery as a property interest; it may be revoked at will

by the legislature, *Ewell v. Daggs*, 108 U. S. 143, 27 L. Ed. 682, 2 S. C. 371. Usury statutes confer a special right of action to recover interest unknown to the common law, *Kurzman, et al. v. Commercial Credit Co.*, 33 Fed. (2d) 358. In *Alston v. American Mortgage Co.*, 157 N. E. 374, 116 Ohio St. 643, the Court stated that we must keep in mind that at common law parties were entitled to make any contract for interest charges, without limit, and that all usury statutes are in derogation of the common law and a restric-
[fol. 56] tion upon the freedom of contract. An old District of Columbia usury statute provided that any rate of interest could be charged that was agreed to by the parties in writing. Usury statutes must be strictly construed.

An action to recover usury abates on the death of the person paying the same. It is in the nature of a tort action given by statute to the person paying it to redress a wrong personal to himself. This proposition is discussed fully in the case of *Charles La Fountain v. Burlington Savings Bank*, 56 Vermont 332, a case in which the usury statute did not give the right to recover usury to any one but the person paying the same, the Court acknowledging that the usury statutes of other states may provide that the person paying usury or his personal representative may recover.

Respectfully submitted, John B. Gunion, Attorney for Appellee, Francis L. Hawes, 1420 New York Avenue, N. W.

I hereby certify that service of the above motion and citation of authorities and exhibits was made on Henry Lincoln Johnson, Attorney for Appellant, 615 F Street, N. W.

By:

1. Delivery to him.
2. Delivery to a person in charge of his office.
3. Leaving it in a conspicuous place in the office.
4. Mail, registered, June 4, 1941.

John B. Gunion.

[fol. 57] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Jul. 11, 1941. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7844

J. OLIVER HILL, Administrator of the Estate of Berthat Byrd, Appellant,

versus

FRANCIS L. HAWES and RAYMOND D. EVANS, Appellee

Opposition to Motion to Dismiss

A. *Failure to Note Appeal Within Time*

It is respectfully submitted that the appeal in this cause was taken within time. It is true that the first notice of appeal was not filed until June 3, 1940, however, under the pertinent rules, their language, purpose and intent, the reason for the vacation of the order of May 7, 1940, and the passing and entry of the order of June 13, 1940, clearly appears. Perhaps the chronological sequence of events prior to the entry of the order of June 13, 1940, and the termination of the hearing of the cause in April 1940, is necessary to clearly present the picture.

This cause was heard in open court, upon the merits, and after argument by counsel, the court, on or about April 18, 1940, decided the cause and requested an order, findings of fact and conclusions of law consistent therewith. Counsel for both parties prepared their versions of these papers which were submitted to the court, on or about April 19, 1940. The Court took the matter of determining which, if any, he would sign under advisement. On May 7, 1940, in chambers, out of the presence of counsel or parties, and without notice thereof, the Court signed the order of May 7, 1940. Neither the then living appellant nor her counsel received any notice thereof, but, through coincidence, became aware of the action of the Court on June 3, 1940, when, and on the same day, counsel filed the Notice of Appeal, dated June 3, 1940. Subsequently and on June 6, 1940 appellant filed a motion to vacate (R. Pg. 38), to which

appellee filed opposing points, and upon which a hearing was had. However, the Court of its own motion, it appear- [fol. 58] ing that the clerk had neglected to notify counsel or appellant of the entry of judgment as required by Rule 77 (d) of the New Rules, vacated the judgment of May 7, 1940, and signed the order of June 13, 1940.

Perhaps a review of the state of the rules at the time that this matter was determined is essential. Prior to the New Rules, the Equity Rules provided as follows: (Supreme Court Rules for Courts of Equity)

Rule 4

Notice of Orders

Neither the notice of an order in the Equity Docket nor its entry in the Order Book shall of itself be deemed notice to the parties or their solicitors; and when an order is made without prior notice to and in the absence of, a party the clerk, unless otherwise directed by the court or judge, shall forthwith send a copy thereof, by mail, to such party or his solicitor and a note of such mailing shall be taken as sufficient proof of due notice of the order.

Under the New Rule this rule was substantially reiterated in Rule 77(d) which provides as follows:

(d) Notice of Orders or Judgments. Immediately upon entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of entry of an order is required by these rules;

Prior to June 3, 1940, your appellant had never had such notice, nor did the clerk make such note of mailing in the docket. Although the rules of the Court of Appeals at the time of the appeal provided that the appeal shall be taken within 20 days of the day when the judgment is "made or pronounced", of old Rule 10, your appellant suggests that "made or pronounced" must be considered in the light of the old rules, Rule 4, Supra; rather than the new rule 10 promulgated February 1, 1941, which incidently conforms

to the New Rules by requiring the notice to appeal within 30 days of Entry of the judgment.

It is suggested that the application of old Rule 10 prior to February 1, 1941, must be considered in the light of Rule 77d, supra and also perhaps in the light of the provisions [fol. 59] of Rule 6 (e), Rules of Civil Procedure.

Furthermore appellee is attempting to review the judgment of the lower court here, by motion, without noting an appeal therefrom or otherwise conforming to the rules of this court or the court below. This is highly irregular and improper.

B.

Because Relief Asked by Appellant Is Moot

Just why appellee suggests the recovery of usury paid, is moot because a lien securing the usurious note has been foreclosed upon is beyond your appellant.

C.

The Right of the Personal Representative to Prosecute this Case

The movant cites several cases in support of the "personal" character of the defense of usury, and several old case- interpreting statutes of other jurisdiction. No attempt will be made in this answer to reply to such cases except by way of indicating that the statutory peculiarities of other jurisdictions are of small moment in light of the clear and uncontroverted statutory provision now in force in the District of Columbia.

Movant cited Chapter 32 Sec. 4 of Compiled Statutes D. C. (Albert and Lovejoy, 1894), otherwise described as R. S. D. C. 716, and 16 States 91, 92, (April 22, 1870). This statute in words and figures provides as follows:

If any person or corporation within the District shall directly or indirectly take or receive any greater amount of interest than is provided for in this chapter, upon any contract or agreement whatever, it shall be lawful for the person, *or his personal representative*, or the corporation paying the same, to sue for and recover all the interest paid from any such contract or agreement *from the person or his personal repesentative* or from the corporation receiving such unlawful interest; but the suit to recover back such

interest shall be brought within one year after such unlawful interest shall have been paid or taken.

[fol. 60] The new statute, Section 1181, 1901 Code, 1911 Code, 1924 Code, and Title 17 Chapter 1 Section 4, was passed on March 3, 1901, 31 stat. 1377, Chapter 854 is as follows:

If any person or corporation in the District shall directly or indirectly take or receive any greater amount of interest than is herein declared to be lawful, whether in advance or not, the person or corporation paying the same shall be entitled to sue for and recover the amount of the unlawful interest so paid from the person or corporation receiving the same, provided said suit be begun within one year from the date of such payment.

It is apparent that, among other changes the words "or his personal representative" has been omitted.

However, at the same time, on the same day, and, in the same enactment, Congress included provisions which otherwise provided for the suit by the personal representative. In Title 24, Sec. 31, March 3, 1901, 31 Stat. 1227, C 854 (Sect. 235) the following provision was set out.

On the death of any person in whose favor or against whom a right of action may have accrued for any cause except in injury to the person or to the reputation, said right of action shall survive in favor of or against the legal representatives of the deceased; but no right of action for an injury to the person except as provided in chapter forty-five of this Code, or to the reputation, shall so survive.

And also in the same statutory pronouncement, Title 29 Sect. 251 (D. C. Code, 1929), March 3, 1901, 31 Stat. 1241 C 854, (as later amended June 20, 1902, 32 Stat. 529 C 1329) Executors and Administrators are specifically authorized as follows:

Executors and administrators shall have full power and authority to commence and prosecute any personal action at law or in equity which the testator or intestate might have commenced and prosecuted, except actions for injuries to the person or to the reputation; and they shall also be liable to be sued in the supreme court of said District in any action at law or in equity, except as aforesaid, which might have

been maintained against the deceased; and they shall be entitled to or answerable for costs in the same manner as the deceased would have been, and shall be allowed for the same in their accounts, unless it shall appear that there were not probable grounds for instituting or defending the suits in which judgments or decrees shall have been given against them.

[fol. 61] It is clear that express statutory authority exists for the survival of this cause and the prosecution thereof by appellant administrator.

In conclusion your appellant suggests that the appellee's motion is based on points more apparent than real and his motion should be dismissed.

Respectfully submitted, Henry Lincoln Johnson, Jr.

This is to certify that a copy of the above reply was mailed to Attorney for appellee on July 11, 1941, post prepaid, at his office.

Henry Lincoln Johnson, Jr., Attorney for Appellant.

[fol. 62] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, OCTOBER TERM, 1941

No. 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Appellant,

v.

FRANCIS L. HAWES and RAYMOND D. EVANS, Appellees

ORDER

On consideration of motion of appellee Francis L. Hawes to dismiss this appeal, and appellant's objections thereto, it is

Ordered by the Court that the motion to dismiss be, and it is hereby, denied, without prejudice to appellee's renewing the motion as to the issue whether the appeal was taken in time, at the hearing of the case on the merits.

Dated November 13, 1941.

Per Curiam.

[fol. 60] IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, JANUARY TERM, 1941

No. 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Appellant

vs.

FRANCIS L. HAWES and RAYMOND D. EVANS, Appellees

RENEWAL OF MOTION TO DISMISS FOR FAILURE TO NOTE APPEAL WITHIN TIME

Pursuant to authority granted by order of this Court dated November 13, 1941, petitioner, Francis L. Hawes, renews ground (A) only, of his motion to dismiss filed June 4, 1941, and moves the Court to dismiss the appeal for failure of respondent to note the appeal within time.

1. The respondent failed to file a notice of appeal within twenty days from the entry of judgment; a notice of appeal was not filed until June 3, 1940 (Tr. 37), more than the twenty days allowed by Rule Number 10 of the Rules of [fol. 61] the United States Court of Appeals for the District of Columbia with amendments to December 16, 1936, in effect at that time. The record in this case, docketed March 3, 1941, discloses that the lower Court entered a final judgment dismissing the suit on May 7, 1940 (Tr. 36) and the docket entry of the filing of the judgment was made by the Clerk of the District Court on May 7, 1940. (Tr. 36.)

2. Respondent in an attempt to gain more time within which to note an appeal filed a motion in the District Court to enter judgment and direct the Clerk to notify parties (Tr. 38), on June 6, 1940, more than twenty days after the entry of the final judgment on May 7, 1940, which was opposed by the petitioner in amended points and authorities filed in answer to this motion on June 7, 1940. (Tr. 39.) This motion was subsequently dismissed by an order of the Court, June 24, 1940. (Tr. 49.)

3. The District Court, however, in order to give respondent an opportunity to note an appeal, entered an order vacating the judgment of May 7, 1940, on the grounds that the Clerk failed to serve a notice of the entry of the judg-

ment by mail on the plaintiff, and to make a note in the docket of the mailing. (Tr. 42.) This order was filed on June 13, 1940, more than twenty days after the final judgment entered on May 7, 1940, being 37 days later. The Court then filed on June 13, the same day, a judgment different in form but identical in substance to that filed on May 7, 1940 (Tr. 41), more than twenty days after the entry on the docket of the judgment of May 7, 1940. This was a violation of Rule 6 (b) of the Federal Rules of Civil Procedure, which provides that various periods of time for the [fol. 62] doing of an act at or within a specified time may be enlarged before the expiration of the time and even after expiration of the time where there is excusable neglect. But this rule specifically provides that the Court may not enlarge the period for taking an appeal as provided by law. This would apply whether the neglect was excusable or inexcusable. This was also in disregard of the guide to the bar and to the Courts in the case of *Burke v. Canfield*, 72 App. D. C. 127, 111 Fed. 2d 526, which held that infinite mischief has been produced in overlooking errors of form and prosecuting appeals in violation of the rules. (See *Wilson Co. v. Ward*, Vol. 69 W. L. R. 489, an opinion concerning Rule 6 (b) by Justice Luhring.) No application by motion or notice for this order of vacation was made either before or after the expiration of the twenty-day period from May 7, 1940, for noting an appeal. (See certificate of the Clerk attached hereto as Exhibit A.)

4. The notation of the judgment in the Civil Docket on May 7, 1940 (Tr. 36) as provided in Rule 79 (a) and Rule 58 of the Federal Rules of Civil Procedure constituted the entry of the judgment and the time from which it became effective for all purposes. A judgment is effective on its entry not the time of service of notice of the entry. The time for taking an appeal cannot be extended for failure to serve notice of the entry of the judgment on the parties.

Siegel vs. Margiotta, 102 Fed. 2d 525. The Court stated the law to be as follows:

> "• • • It has always been the uniform custom in federal courts so far as we know to make the time to appeal begin with the entry of the judgment, not with its [fol. 63] service upon the putative appellant; that the New Rules of Civil Procedure (28 U. S. C. A. following

section 723 c) have not changed. *Thus the Appellant must at his risk keep watch upon the entry of an order.*" (Italics supplied.)

5. There was ample notice. After the hearing of this case on April 19, 1940, oral pronouncement in open court of the findings of fact and conclusions of law on April 24, 1940 and the submission of proposed findings of fact by both parties on May 1, 1940 at which time Mr. Johnson obtained a few days to submit further findings which, however, were never submitted, the findings of fact and decree were filed on May 7, 1940 and entered on the docket. It is quite apparent that Mr. Johnson was not in the dark in these proceedings. We may infer also that if he had seriously intended to file additional findings of fact even after a "few days," he would have discovered the entry of the decree. (See full statement of occurrences, Exhibit C.) Bertha Byrd was sent, as is customary, a clipping of the advertisement of the June 4, 1940 sale and her attorney admitted that she had received it long before the 20 days for taking an appeal had elapsed, but had not turned it over to him. (See amendment to certificate of Katherine N. Hawes, Exhibit D.) The newspaper clipping on the records of the auctioneer and the receipted bill from the newspaper shows that it appeared publicly in the newspaper on May 13, 18, 25, 28, and June 3, 1940. On about June 3, 1940 Mr. Johnson stated he did not know about the 20 day limit for noting an appeal. (See Exhibit C.)

6. Respondent subsequently filed another notice of appeal on June 14, 1940 (Tr. 43) more than twenty days after [fol. 64] the final judgment entered by the lower Court on May 7, 1940, being 38 days later.

7. Petitioner filed a motion in District Court on June 24, 1940, to reconsider the order to vacate the judgment (Tr. 44) with an attached affidavit and exhibit (Tr. 47 & 48) which motion, affidavit and exhibit disclose that the respondent had notice or should have had notice of the entry of the decree of May 7, 1940, and that the Clerk of the District Court entered in his Civil Order Book a note of the mailing of the notice of entry of the judgment. Inasmuch as no order overruling this motion has been entered (see attached certificate of the Clerk of the District Court, Exhibit A) petitioner offers the explanation to the Court of

Appeals that the Court below did overrule said motion stating that it did not wish to cut off any person from an appeal, and that petitioner's attorney (see certificate, Exhibit B) did draw up an order overruling said motion when it became evident that the record was remaining incomplete and did present this order to respondent's attorney, for signing and filing.

8. It is a well recognized policy of the law to prohibit and prevent continuously delayed and uncertain litigation of an issue after litigants have had their day in Court and have been afforded due process of law. This policy is strictly enforced in order that society may not be continuously stirred up and harassed by long-continued, uncertain litigation, the continuance and uncertainty of which is more detrimental to litigants and society than any alleged original grievance of one member of society against another. The constant and continuous failure of attorneys and [fol. 65] Courts to comply with the rules of Court results in an onerous burden to the litigants involved and to society as a whole.

Respectfully submitted, John B. Gunion, Katherine H. Hawes, Attorneys for Petitioner, Francis L. Hawes, 1420 New York Avenue, N. W.

EXHIBIT "A"

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE DISTRICT OF COLUMBIA

Civil Action 5003

BERTHA BYRD, Plaintiff,

vs.

FRANCIS L. HAWES, et al.

CERTIFICATE OF THE CLERK

This is to certify that the record of Bertha Byrd vs. Francis L. Hawes, Civil Action Number 5003 does not show the filing of any motion, or notice in writing to vacate the judgment of May 7, 1940. The only entry concerning

vacation of the judgment is that of the order of June 13, 1940 vacating the judgment; nor does the record show that [fol. 66] any order overruling the motion to reconsider order vacating judgment has been entered.

Charle E. Stewart, Clerk; by Chas. D. Coffin, Assist Clerk. (Seal.)

May 12, 1941.

EXHIBIT "B"

John B. Gunion, attorney for appellee, Francis L. Hawes, certifies that the District Court overruled the motion to reconsider the order vacating the judgment stating that it did not wish to cut off anyone from his opportunity to have a review of its decision in the case. This was in the early fall of the year of 1940; that he later became aware that no order had been presented showing that the motion had been overruled and the record was incomplete; that he drew up an order overruling the motion and presented it to an associate of appellant's attorney for signing and filing.

John B. Gunion.

[fol. 67] EXHIBIT "C"

Certificate of Katherine N. Hawes Attorney for Francis L. Hawes in Proceedings in District Court

I, Katherine N. Hawes, attorney for Francis L. Hawes, in the proceedings in this case in the District Court of the United States for the District of Columbia, do hereby certify that I have a personal recollection of the sequence of events in the case at bar from April 18, 1940 through the following summer, and that this recollection is fortified by memoranda made by me on my personal desk calendar and on copies of papers filed with the court.

The trial in this case was set for April 18, 1940 but was postponed to the following day at the instance of the plaintiff. On Friday, April 19, 1940 the case was heard in open court. At the termination of the hearing Judge Goldsborough indicated that he would take the case under advisement and read the brief which I had submitted at that time. Later Judge Goldsborough's Clerk, Mr. Molen-

off, telephoned me to ask whether I was having the transcript of the evidence written up, to which I replied that I would do so if it would be helpful to Judge Goldsborough. Whereupon I ordered the stenographic transcript and requested that it be taken direct to Judge Goldsborough. I believe Judge Goldsborough received the transcript on Monday, April 22, 1940. The decision in this case was rendered in open court on Wednesday, April 24, 1940, at which time the attorneys for plaintiff and defendant were present and were directed to draw up findings of fact, conclusion of law and a decree in accordance with the ruling of [fol. 68] Judge Goldsborough dismissing the complaint. A conference with Judge Goldsborough in chambers was set for Tuesday, April 30, 1940, but was postponed one day to Wednesday, May 1, 1940, on which day this attorney of record submitted her version of the findings of fact, conclusions of law and decree and Mr. Henry Lincoln Johnson, Jr., attorney for plaintiff, submitted his version of the findings of fact. Mr. Johnson and I exchanged copies of these papers in the Judge's chambers. Judge Goldsborough carefully read the papers submitted and then indicated that he would sign the findings of fact, conclusions of law and decree submitted by me. Mr. Johnson objected and entered into a heated discussion with Judge Goldsborough. Whereupon, Judge Goldsborough stated that he would hold up the signing of the papers submitted by me for a few days in order to give Mr. Johnson opportunity to make further suggestions in writing. So far as this attorney knows and the record shows no further suggestions were ever made by Mr. Johnson, and the decree was forthwith entered as of May 7, 1940.

The first hint that this attorney of record had that plaintiff was considering appealing the case at bar was on June 3, 1940 in a telephone conversation with plaintiff's attorney. Mr. Johnson then orally notified me that plaintiff was going to appeal and that he was going to ask the court to enjoin defendant from a proposed foreclosure sale. I answered that plaintiff could not appeal, that it was too late. Whereupon, Mr. Johnson rejoined that plaintiff had 40 days from the date of the entry of judgment and that the time for appeal had not elapsed. Thereupon we entered into an argument over the content of the rules of the courts, and Mr. Johnson plainly stated that he did not know about the twenty day rule.

[fol. 69] Appellant, plaintiff below, never filed a motion to vacate the judgment of May 7, 1940, but did file a Motion to enter Judgment and direct Clerk to notify parties, on June 6, 1940. On this same day the attorneys for plaintiff and defendant appeared in open court before Judge Goldsborough for the purpose of arguing the granting of an extension of time to plaintiff for noting an appeal. This matter was presented orally after the twenty day period for appeal had lapsed and not by motion. Judge Goldsborough indicated that he did not wish to foreclose plaintiff's right to appeal and that he would extend the time for taking the appeal. Just as this attorney was preparing to leave court after Judge Goldsborough's decision, the plaintiff's attorney handed this attorney a copy of the above mentioned Motion to enter Judgment, the only motion filed by plaintiff with reference to securing more time for taking an appeal. Judge Goldsborough's Clerk, Mr. Molenoff, later informed this attorney that Judge Goldsborough had directed Mr. Johnson to withdraw the motion he had filed, and stated further that Judge Goldsborough was not considering this motion. Judge Goldsborough, then, without notice to this attorney of record or giving her opportunity to be heard on the matter and as a complete surprise, entered an order vacating the original decree of May 7, 1940 on June 13, 1940 and entering a new Judgment as of that date. Copies of these orders of June 13, 1940 were never submitted or sent to this attorney and it became necessary for me to copy them at the courthouse. On June 24, 1940 plaintiff's Motion to enter Judgment and direct Clerk to notify parties, which had been duly answered by the defendant, came up for hearing in Motions Court, said motion never having been withdrawn. Judge O'Donoghue dismissed the motion.

Katherine N. Hawes.

[fol. 70] EXHIBIT "D"

Amendment to Certificate of Katherine N. Hawes

(Filed herewith for first time)

Katherine N. Hawes further states that Henry L. Johnson Jr. Esq. on or about June 3, 1940 stated in the telephone conversation, referred to in the original certificate (Ex-

hibit C), that Mrs. Byrd had received a clipping of the newspaper advertisement of the foreclosure sale but had not turned it over to him.

Katherine N. Hawes.

[fol. 71] EXHIBIT "E"

(Filed herewith for first time)

Book 71 Folio 280. Phones, NAtional 3090—3091

Account Sales of 616 K Street, Southwest.

Sold for account of Raymond D. Evans, Substituted and Sole Trustee.

By Thomas J. Owen & Son, Real Estate Auctioneers and Appraisers, 1431 Eye Street Northwest, Washington, D. C.

Thos. J. Owen & Son, Auctioneers 1431 Eye Street, Northwest.

Trustee's Sale of Valuable Brick Dwelling Known as Premises No. 616 K Street, Southwest.

By virtue of a certain deed of trust duly recorded, in Liber No. 6350, Folio 353 *et seq*, of the land records of the District of Columbia, and at the request of the party secured thereby, the undersigned trustee will sell, at public auction in front of the premises, on Tuesday the Fourth Day of June A. D. 1940, at Three O'Clock P. M. the following-described land and premises, situate in the District of Columbia, and designated as and being lot 35 in John Van Riswick's subdivision of lots in Square 471 as per plat [fol. 72] recorded in the Office of the Surveyor for the District of Columbia in Liber W. F. at folio 30.

Terms: Sold subject to a prior deed of trust for $3,500.00 now overdue, further particulars of which will be announced at time of sale; the purchase price above said trust to be paid in cash. A deposit of $300.00 required. Conveyancing, recording, revenue stamps, etc., at purchaser's cost. Terms to be complied with within thirty days, otherwise deposit forfeited and the property may be advertised and resold at the discretion of the trustee.

Raymond D. Evans, *Substituted and Sole Trustee.*
Katherine N. Hawes, *Attorney for Holder of Note.*

Appointed in Civil Action No. 5003.

June 4, 1940

Sold to J. Oliver Hill for	$1,200.00
Subject to prior deed of trust (overdue) for	3,500.00
" " overdue interest	
" " " " taxes	$4,700.00
" " appeal filed in Court of Appeals	

[fol. 73] Charges

To Herald	$30.00
" Fee	25.00
" Balance	245.00
By Deposit $300.00	$300.00

EXHIBIT F

(Filed herewith for the first time)

Times Herald
Published Daily and Sunday
Washington, D. C.

June 3, 1940

Thos. J. Owen & Son, 1431 Eye Street, N. W., Washington, D. C.

Trustees: Raymond D. Evans.

Classified Advertising. Date: 1940, May 13, 18, 25, 28; June 3. 616 K Street, S. W.

Paid. Times-Herald.

[fol. 77] Thursday, May 14th, A. D. 1942.

Before Honorable Harold M. Stephens, Fred M. Vinson and Henry W. Edgerton, Associate Justices

No. 7844

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

vs.

Francis L. Hawes and Raymond D. Evans, Appellees

The argument in the above entitled cause on the motion to dismiss was commenced by Mr. John B. Gunion, attorney for appellee, and concluded by Mr. Henry Lincoln Johnson, Jr., attorney for appellant. Appellees allowed to file memoranda.

The argument on the merits in the above entitled cause was commenced by Mr. Henry Lincoln Johnson, Jr., attorney for appellant, continued by Mr. John B. Gunion, attorney for appellees, and concluded by Mr. Henry Lincoln Johnson, Jr., attorney for appellant. Appellant allowed five days within which to file statement of facts; appellees allowed three days to file counter-statement. Appellees allowed to file memorandum of additional authorities.

[fol. 75] IN UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

No. 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

v.

FRANCIS L. HAWES, Individually, etc., et al.

Appeal from the District Court of the United States for the District of Columbia

Decided October 12, 1942

Mr. Henry Lincoln Johnson, for appellant.
Mr. John B. Gunion, with whom *Miss Katherine N. Hawes* was on the brief, for appellees.

Before Stephens, Vinson and Edgerton, Associate Justices

OPINION

STEPHENS, *Associate Justice:*

This case was brought here on appeal from a decree of the District Court of the United States for the District of Columbia dismissing a complaint of the plaintiff below, the appellant here. On June 4, 1941, the appellee filed in this court a motion to dismiss the appeal upon the ground, among others, that it was not noted within time. On November 13 following, we denied this motion without prejudice to the appellee's right to renew the same, upon the single ground mentioned, at the argument on the merits. The motion was so renewed and was argued at the time of the argument on the merits. We think the motion to dismiss must be granted.

After the hearing below on the complaint and an amended answer, proposed findings of fact and conclusions of law were presented to the trial judge by each party on May 1, 1940. On May 7 the judge signed a judgment dismissing the complaint. This judgment was noted in the docket in compliance with Rule 79 (a) of the Federal Rules of Civil Procedure which requires the clerk of the District Court to

keep a civil docket, and requires that all judgments shall be noted chronologically in the same and that the notation of a judgment shall show the date the notation is made. Rule 58 provides that the notation of a judgment in the civil docket as required by Rule 79 (a) constitutes the entry of the judgment and that the judgment is not effective before such entry. Rule 10 of the rules of this court in effect until January 31, 1941, provided:

> No * * * judgment * * * of the District Court of the United States for the District of Columbia, or of any justice thereof, shall be reviewed by the Court of Appeals, unless the appeal shall be taken within 20 days after the * * * judgment * * * complained of shall have been made or pronounced. * * *

That twenty day period expired May 27, 1940. No notice of appeal was filed in the District Court during that period, although one was filed on June 3. At the time of the entry [fol. 76] of the judgment of dismissal on May 7 the clerk apparently did not send out the notice required by Rule 77 (d) of the Federal Rules of Civil Procedure. That rule provides:

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon every party affected thereby who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers.

No note in the docket of the mailing of such a notice appears in the record before us, and it is without dispute in the case that no such notice was sent out. On June 6, notwithstanding the entry of the judgment of dismissal on May 7, the appellant filed a "Motion to Enter Judgment and Direct Clerk to Notify Parties." The motion stated as reasons that "the clerk of the court had failed to enter the day or month of the judgment of this court as is required by the rules of this court," and "that the clerk of this court has failed to notify the parties to this cause of the action of the court in this cause." This motion was not acted on until

June 24, 1940, when the District Court denied it. But in the meantime, on June 13, the trial judge, apparently on his own motion, ordered the judgment of May 7 vacated "for the reason that the clerk failed under Rule 77 (d) of the Rules of Civil Procedure to serve a notice of the entry of judgment by mail on the plaintiff * * * and to make a note in the docket of the mailing." On the same day, June 13, the trial judge signed and filed a second judgment in the same terms as the one of May 7. This judgment was noted in the docket. The appellant, treating this judgment of June 13 as the effective judgment in the case, filed a notice of appeal from it on June 14.

The question under the motion to dismiss is whether or not the appeal must have been taken within twenty days from the entry of the first judgment on May 7, or, putting it otherwise, was the trial judge warranted, because of the failure of the clerk to notify the parties of the entry of the judgment of May 7, in entering a second judgment, the one of June 13, and did the trial judge's action have the effect of extending the time for appeal, that is, of starting a second period of twenty days to run.

Three other rules of the Federal Rules of Civil Procedure are urged as pertinent: Rule 6 (b) by the appellee; Rules 60 (a) and 60 (b) by the appellant. Rule 6 (b) permits the trial court to enlarge time, but expressly states that "it may not enlarge * * * the period for taking an appeal as provided by law." Rule 60 (a) provides:

> Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders.

Rule 60 (b) provides, so far as here pertinent:

> On motion the court, upon such terms as are just, may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. * * *

[fol. 77] We are cited to no authority and find none construing the rules above referred to in respect of the particular point with which we are here concerned. We must therefore decide the question according to our best judgment as to the meaning of the rules as written.

We think that while the requirement of Rule 77 (d) that the clerk immediately upon the entry of judgment shall serve a notice of the entry by mail upon the affected parties and make a note in the docket of the mailing of such notice should be complied with in every case, nevertheless the effectiveness of a judgment does not depend upon compliance with that requirement, but only upon notation in the civil docket as provided by Rules 58 and 79 (a); and we think that the failure of the clerk to comply with Rule 77 (d) did not warrant the District Court's setting the judgment aside. We think that the prohibition of Rule 6 (b) against the District Court's enlarging the period for the taking of an appeal as provided by law is absolute. We think that Rules 60 (a) and 60 (b) are inapplicable. The omission of the clerk to mail the notice of entry of judgment and to make a note in the docket of the mailing cannot correctly be described as a clerical mistake in the judgment itself within Rule 60 (a). So far as 60 (b) is concerned, there was no motion before the trial court to relieve *a party or his legal representative* from a judgment taken against him through *his* mistake, inadvertence, surprise or excusable neglect. The mistake involved in the omission to mail the notice of entry of judgment and to make a note in the docket of the mailing was that of the clerk. It is well settled that the rules of this court have the force of law. *Murphy* v. *Gould*, 39 App. D. C. 363 (1912), *certiorari denied*, 226 U. S. 613 (1913); *Talty* v. *District of Columbia*, 20 App. D. C. 489 (1902). *Cf.* also *Ex parte Dante*, 228 U. S. 429 (1913). In that case the same Rule 10 of our old rules as is involved in the instant case was the subject of the decision.

In *Credit Co.* v. *Ark. Central Railway*, 128 U. S. 258 (1888), a final decree dismissing a bill for want of equity was entered on January 22, 1883, by the United States Circuit Court for the Eastern District of Arkansas. At that time the period within which a writ of error might be brought or an appeal taken to the Supreme Court was two years after the entry of a judgment, decree or order. On January 22, 1885, exactly two years after the entry of the decree of dismissal, a petition for an appeal was presented to Mr. Justice Miller of the Supreme Court by the plaintiff and allowed, and at the same time that he allowed the appeal, he signed a citation to the defendants to appear in

the Supreme Court to answer the appeal, and he also then approved a bond for costs presented to him. These papers were, however, not presented to the Circuit Court and filed with the clerk thereof until January 27, 1885. At that time under a ruling of the Supreme Court in *Brooks* v. *Norris*, 11 How. 204 (U. S. 1850),[1] it was the rule that it was the filing of the appeal papers in the inferior court which removed the record therefrom to the appellate court and that the period of limitation prescribed by the Act of Congress must be calculated accordingly. When the papers were presented to the Circuit Court on January 27 that court, [fol. 78] apparently in an attempt to make the appeal effective notwithstanding the five day lapse, entered an order in the following terms:

> Comes N. & J. Erb [attorneys for the plaintiff] and pray the court to enter an order granting to the plaintiff an appeal in this cause to the Supreme Court of the United States, which motion is denied, such appeal having heretofore been granted. It is ordered by the court that this entry bear date as of January 22, 1885. [128 U. S. at 259]

In short the Circuit Court attempted by a nunc pro tunc order to make it appear that the appeal had been perfected within the two year period. The Supreme Court, on its own motion, dismissed the appeal as late. In respect of the nunc pro tunc order, speaking through Mr. Justice Bradley, it said:

> The attempt made, in this case, to anticipate the actual time of presenting and filing the appeal, by entering an order *nunc pro tunc*, does not help the case. When the time for taking an appeal has expired, it cannot be arrested or called back by a simple order of court. If it could be, the law which limits the time within which an appeal can be taken would be a dead letter. [128 U. S. at 261]

The device of attempted vacating of the first judgment and the filing and noting in the docket of another in the instant case we think equally ineffective. It, if recognized, would,

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[1] This decision was adhered to in *Mussina* v. *Cavazos*, 6 Wall. 355 (U. S. 1867); *Scarborough* v. *Pargoud*, 108 U. S. 567 (1883); *Polleys* v. *Black River Co.*, 113 U. S. 81 (1885).

like the nunc pro tunc order in *Credit Co.* v. *Ark. Central Railway*, make a dead letter of our rule fixing a definite time for appeal.

In accordance with the foregoing the motion to dismiss the appeal is granted; costs to be borne by the appellant.

Appeal dismissed.

[fol. 82] Monday, October 12th, A. D. 1942.

Before Honorable Harold M. Stephens, Fred M. Vinson and Henry W. Edgerton, Associate Justices, in Chambers

No. 7844, October Term, 1942

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

vs.

Francis L. Hawes, Individually &c., et al., Appellees

Appeal from the District Court of the United States for the District of Columbia

Judgment

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that this appeal be, and the same is hereby, dismissed, with costs to be borne by appellant.

Per Mr. Justice Stephens.

Dated October 12, 1942.

[fol. 83] Wednesday, November 4th, A. D. 1942.

Before Honorable Harold M. Stephens, Fred M. Vinson and Henry W. Edgerton, Associate Justices, in Chambers

No. 7844

J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

vs.

Francis L. Hawes, Individually, etc., et al., Appellees

On consideration of appellant's motion for a rehearing and for a stay of the mandate for thirty days,

It is ordered by the Court that the motion for rehearing be, and it is hereby, denied, and that the motion for a stay of the mandate for thirty days be, and it is hereby, granted.

[fol. 84] [Stamp:] United States Court of Appeals for the District of Columbia. Filed Jan. 30, 1943. Joseph W. Stewart, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

Number 7844

J. OLIVER HILL, Administrator of the Estate of Bertha Byrd, Deceased, Appellant,

vs.

FRANCIS L. HAWES, etc., et al., Appellees

DESIGNATION

The clerk of the Court will please prepare a certified transcript of the following proceedings and papers in the above entitled cause:

1. Appendices of the briefs of Appellant and appellee Hawes.
2. Minute entry of argument.
3. Motion of Appellee Hawes to Dismiss Appeal, omitting all exhibits attached thereto.
4. Minute entry of denial of motion to dismiss appeal with leave to renew the same.
5. Reply of Appellant to motion to dismiss.
6. Renewed motion to dismiss appeal.
7. Opinion.
8. Judgment.
9. Minute entry of denial of petition for rehearing.
10. This designation.
11. Clerks certificate.

Henry Lincoln Johnson, Jr., Attorney for Appellant Hill.

This is to certify that I have mailed to John B. Gunion, Esq., 1420 N. Y. Ave. N. W., attorney for appellee Hawes, a copy of the foregoing Designation this 31st day of January, 1943.

Henry Lincoln Johnson, Jr.

[fol. 85] UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

I, Joseph W. Stewart, Clerk of the United States Court of Appeals for the District of Columbia, hereby certify that the foregoing printed and typewritten pages numbered from 1 to 84, both inclusive, constitute a true copy of the appendices to the briefs of the parties and the proceedings of the said Court of Appeals as designated by counsel for the appellant in the case of: J. Oliver Hill, Administrator of the Estate of Bertha Byrd, deceased, Appellant, vs. Francis L. Hawes, Individually, etc., et al., Appellees, No. 7844, October Term, 1942, as the same remain upon the files and records of said Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this second day of February, A. D. 1943.

Joseph W. Stewart, Clerk of United States Court of Appeals for the District of Columbia. (Seal.)

[fol. 82] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed April 5, 1943

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: File No. 47,209, U. S. Court of Appeals, District of Columbia, Term No. 4. J. Oliver Hill, Administrator of the Estate of Bertha Byrd, Deceased, Petitioner, vs. Francis L. Hawes, Individually and as Trustee and Raymond D. Evans, Trustee. Petition for a writ of certiorari and exhibit thereto. Filed February 4, 1943. Term No. 4 O. T. 1943.